

## Frequently Asked Questions

1. Are photographs taken on classified or restricted sites accessible under the Freedom of Information Act or a discovery request in a legal proceeding?

Unless the photograph is specifically classified under a National Security Directive (highly unlikely given the nature of safety and health work) or shows a subject which itself is specifically classified then the photograph is discoverable. A photograph of an accident scene involving a contractor even though it is on a DoD site would be accessible. A photograph of a safety or health matter like a photograph of mold would be discoverable. Should such a request be presented the government may still contest the release of photographs, however the trend in recent case law supports a high probability that photographs even on classified sites will be discoverable.

2. Can ownership of a photograph be implied?

One of the changes in the copyright law specifically addressed this issue. Unless a written agreement or employment statement existed prior to the photograph then ownership by the photographer is automatic. The government can not violate its own mandate regarding ownership. It may exercise a confiscation of the photographs as evidence but it can not own them without a written agreement or specific employment policy or contract. In the case of a safety and health contractor performing work on government property or any private property, ownership remains with the photographer unless there is a written agreement in advance. If the contractor seeks to retain ownership and control of photographs then a signed written agreement must be in place and cover all aspects of photography anticipated. Where the contractor is conducting photography on property not owned by the contractor, the property owner must be advised of the conditions of photography ownership before the photographs are taken. This is a significant legal issue because the property owner has a right under the law to control or prohibit photography in a situation where a photographer will not surrender control of photographs in a written agreement. Without a written agreement a contractor or third party cannot act as an agent of the photographer in resolving ownership rights.

3. What are the pros and cons of negative film versus digital images, if they might be used as evidence in a legal proceeding?

Contrary to popular belief negative film remains the mainsail of Investigative Photography for a variety of reasons. First and for most is the impeccable track record negative film has for performance as evidence in all forms of legal proceedings. A century has been spent in court proceedings analyzing negative film as evidence, with profound impacts. There is a well established method for negative film acceptance as evidence. In short if you want a photograph to perform well as evidence and possibly turn a case in your favor then the only choice is negative film.

The second significant challenge of any evidence collection is chain of custody. Part of the reason why negative film has the incredible credibility it does in court proceedings is the ease to which authenticity can be established in chain of custody. Because of this attribute negative film is almost never dismissed nor is its evidentiary weight devalued.

The same cannot be said about digital images. In fact experts in the field of forensics and criminal photography express a common view that negative film will not be replaced by digital imagery because of significant technical issues that are unlikely to be resolved satisfactorily in legal proceedings.

Digital photography is attractive because it is fun and easy. There is nothing about the purpose for collecting evidence that ought to be fun and easy. There have been many recent examples of digital imagery in the media. There is no doubt it can be sensational, the ease to which digital recorders can be used and the lower costs means we will be seeing more and more of the grainy like images these cameras produce. However, if you track their actual performance in the legal proceeding you begin to see the lack of impact they ultimately have as evidence. A fact that the public doesn't get reminded of after the trial has concluded. A review of cases where digital photography has been introduced shows that as evidence the images have been devalued significantly and have very low impact as evidence on the outcome of the case. Even in test cases by the government (FBI, DEA) on the use of digital imagery as evidence the results have not met the standard that negative film has provided.

As an organization you have to decide why you want to take photographs, what you plan to do with them and how much risk you are willing to accept if some one else gets to use your photographs in ways that will ultimately work against your reasons for taking the photographs and your professional credibility. These must be very real concerns on your part and quite frankly are the legitimate concerns of legal council when the view that photography should not be used if it means poor photographs or digital images will be the result. A digital image is discoverable and can be introduced into a legal proceeding. The affect is often that evidentiary weight that could be assigned is not realized and the image or process gets confusing and is discredited to some degree.

In summary,

Advantages of negative film: great chain of custody performance, great color rendition, great enlargement capability, great storage and retrieval, great speed capabilities for taking fast action series (multiple exposures quickly) and high technology performance is very affordable.

Disadvantages of negative film: development process quality control and time sensitive needs, acclimatization needs for colder temperatures, protection and inventory of unexposed film.

Advantages of digital: great immediate access to an image, memory cards are easy to handle, the ultimate of point and shoot (idiot proof approach to quality performance), no acclimatization for colder temperatures, quick turn around for electronic uses like email, website and report applications.

Disadvantages of digital: high technology performance is extremely expensive, memory cards and file sizes for high resolution is not cost competitive to negative film, chain of custody has not been established as a precedent in legal proceedings, poor enlargement performance, poor color rendition requiring a color scale for every photograph

Recommendations:

1. Implement an organizational policy for photograph use and ownership
2. Spend approximately \$700 – \$800 to equip a program with negative film technology for specific evidence collection purposes
3. Purchase digital equipment but limit the unit cost to \$200 or less
4. Use both in compliment to each other for investigative purposes
5. Limit the use of digital photography

4. Some cameras allow a date and time stamp to be added by the camera to the image. Is this a feature we should specify if buying a camera? Should it be used if available when taking photos?

Any debris on an image will compromise the integrity of the evidence or its value. A date and time stamp is considered debris. More importantly, it does not prove anything. Regardless of what you may have heard, any software can be altered or manipulated. File dates can be changed. By not putting it there, you are avoiding some inevitable arguments that may be used to ultimately discredit your program. If the concern is about demonstrating a chain of custody, a date / time stamp is taking you away from what you need to do. It is a bad argument to make that a stamp is your chain of custody simply because it is easy to put it there.

5. How does one certify that a digital image was not altered using photo-shop or other image processing software? I am thinking of more drastic alterations than cropping the edges or shifting the color balance. For example, in the incriminating photo you showed of an unprotected state trooper standing in the middle of a spill response, the trooper could be obscured from the image by blurring that portion of the image or by cloning adjacent areas of the image over the trooper.

Tell the truth and be credible in doing so. Make sure there is no valid argument why any one would be motivated to change the image. Make sure that no conversation occurred regarding how the image could be better as evidence. At a minimum you will need to develop a written policy and procedure for digital imagery. I have worked with clients to accomplish this and it is generally a two step process. First, the organization needs to define how it will use photography and the risks associated with digital imagery for those uses. Then the organization must implement a procedure of safeguards and provide specific training to those designated to photograph. Bringing in an outside expert (independent unbiased source) to assist you creates a distinct advantage in validating your program and adds the credibility necessary to testify to the program and its products. It is not a guarantee that digital imagery is going to be better; it does however serve to defuse the more severe arguments that can completely devalue the image as evidence and the program that supported it.

Any alteration including cropping the edges or shifting the color balance could result in allegations and or charges of evidence tapering and obstruction. It is very likely that the disclosure of any changes or lack of protection against even inadvertent changes will result in the images being dismissed as evidence of anything. If the image is being offered as evidence and changes were made or occurred anyone associated with the changes or knowledge they occurred may be implicated. The example you suggest would be a felony and prosecution and conviction would be the most likely result.

Stan,

I hope this helps clarify the issues you raised in your questions. I hope we can work together to enable your program to deliver the results that you need.

Thanks for opportunity,

John